

# EXHIBIT B



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# Transcript of Hearing

**Date:** May 29, 2024

**Case:** Rojo -v- Homer Tree Care, Inc.

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Transcript of Hearing  
Conducted on May 29, 2024

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<p>1 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS</p> <p>2 COUNTY DEPARTMENT, LAW DIVISION</p> <p>3 - - - - - x</p> <p>4 ALEJANDRO ROJO, :</p> <p>5 PLAINTIFF, :</p> <p>6 v. : Case No.</p> <p>7 HOMER TREE CARE, : Commercial Calendar N</p> <p>8 INC., : 23 L 8588</p> <p>9 DEFENDANT. :</p> <p>10 - - - - - x</p> <p>11</p> <p>12 B E F O R E:</p> <p>13 JUDGE MARY COLLEEN ROBERTS</p> <p>14</p> <p>15 MOTION HEARING</p> <p>16 Virtual via Zoom</p> <p>17 Wednesday, May 29, 2024</p> <p>18 12:38 P.M. Eastern Time</p> <p>19</p> <p>20</p> <p>21 Job No.: 537350</p> <p>22 Pages: 1 - 41</p> <p>23 Reported By: Mary Vazquez-Jaime, CCR</p> <p>24</p>	<p>1 P R O C E E D I N G S</p> <p>2 MS. KAYS: Thank you, Your Honor. So</p> <p>3 again, you know, not to reiterate everything that</p> <p>4 was in our papers, but the high level points.</p> <p>5 This is our motion to dismiss. We move under</p> <p>6 2-619 as well as 2-615. I'll address the 2-619</p> <p>7 argument first and happy to address the other</p> <p>8 arguments.</p> <p>9 Our 2-619 argument is that my client,</p> <p>10 Homer Tree is exempt under BIPA. Section 25(e) of</p> <p>11 BIPA very clearly states that the statute does not</p> <p>12 apply to a contractor with a local or State</p> <p>13 agency. And it says that the exemption applies to</p> <p>14 all sections of BIPA.</p> <p>15 Under that exemption, we argue that the</p> <p>16 statute does not apply to my client because my</p> <p>17 client was a contractor of both state and local</p> <p>18 governments of -- local units of government during</p> <p>19 the entirety of the plaintiff's employment. Now,</p> <p>20 as a reminder, this is a single plaintiff lawsuit;</p> <p>21 this is not a class action. Regardless, during</p> <p>22 the time that Mr. Rojo, the plaintiff, was working</p> <p>23 for my client, our client was a government</p> <p>24 contractor that entire time. They contracted with</p>
<p>1 A P P E A R A N C E S</p> <p>2 ON BEHALF OF THE PLAINTIFF:</p> <p>3 ADAM FEUER, ESQUIRE</p> <p>4 DJC LAW, PLLC</p> <p>5 140 South Dearborn Street</p> <p>6 Suite 1610</p> <p>7 Chicago, Illinois 60603</p> <p>8 312.442.5555</p> <p>9 adam@teamjustice.com</p> <p>10</p> <p>11 ON BEHALF OF THE DEFENDANT:</p> <p>12 DANIELLE M. KAYS, ESQUIRE</p> <p>13 FISHER PHILLIPS</p> <p>14 10 South Wacker Drive</p> <p>15 Suite 3450</p> <p>16 Chicago, Illinois 60606</p> <p>17 312.346.8061</p> <p>18</p> <p>19 ALSO PRESENT:</p> <p>20 ANGELICA SMITHE, COURT CLERK</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p>1 IDOT and hundreds of local government contracts</p> <p>2 during the entirety that he claims there were</p> <p>3 alleged violations of BIPA. On top of it, we have</p> <p>4 submitted a declaration to support that. But</p> <p>5 we've also submitted a declaration that says that</p> <p>6 the plaintiff worked on those government contracts</p> <p>7 for my client.</p> <p>8 Now, the key issue that I think the</p> <p>9 plaintiff takes up is, what does "when working</p> <p>10 for" mean. Now, again, under BIPA, the language</p> <p>11 specifically says that: Nothing in this Act shall</p> <p>12 be construed to apply to a government contractor,</p> <p>13 subcontractor, agent of a State agency or local</p> <p>14 unit of government when working for that State</p> <p>15 agency or local unit of government.</p> <p>16 Now, we do understand the Court's position</p> <p>17 about the cases that have decided this issue. But</p> <p>18 the issue of "when working for" in the statute is</p> <p>19 very clear. Because of that, there is no need to</p> <p>20 go to legislative intent. The issue is if the</p> <p>21 defendant was a contractor and if it was working</p> <p>22 for that unit of government at the time that it</p> <p>23 collected or disseminated biometric information.</p> <p>24 Regardless to whether that is clear or</p>

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2 (5 to 8)

5	7
<p>1 not, plaintiff has not cited to a single decision 2 or authority that discusses of the legislature's 3 intent of this 25(e) section of BIPA. Instead, 4 it's clear that "when working for" means it's a 5 temporal -- it's a temporal matter. And again, 6 there's no evidence, there's nothing that 7 contradicts that my client was a government 8 contractor during the entire time that the 9 plaintiff was working; and on top of it, that he 10 worked on those contracts. 11 All that is required under the statute, 12 under the plain meaning, is that these alleged 13 violations occurred during the same period of 14 time. And we have established that. There's no, 15 you know, authority that says that the legislature 16 meant anything else. But then again, it doesn't 17 matter because it's not unambiguous. 18 And just as a practical matter, what 19 they're arguing is that we need to only apply this 20 exemption to BIPA if a person is specifically 21 working on a day or moment or time on a government 22 contract. And that, classically speaking, is 23 ludicrous. That would mean that a defendant would 24 have to -- or a government contractor would have</p>	<p>1 Mr. Feuer respond and then you can reply. And 2 then we'll go into the 615. How about that? 3 MS. KAYS: Sure, that sounds good. 4 MR. FEUER: Thank you, Your Honor. 5 THE COURT: Just give me one second. 6 MR. FEUER: Of course, yeah. 7 THE COURT: Okay. One more second. 8 Okay. Go ahead. 9 MR. FEUER: Thank you. So, you know, Your 10 Honor, as you noted at the outset, this specific 11 issue is not settled law. The defendant asserts 12 that it is -- that it was settled by Enriquez, 13 which is an unpublished First District decision. 14 However, that case did not address the specific 15 question at issue today in this case at all, and 16 it's unpublished and not binding in any event. 17 But the bottom line that the Court today 18 is free to rule on this issue consistent with what 19 it believes is the most fair. There's no binding 20 interpretation of what the "when working for" 21 modifying clause to the government contractor 22 exemption means, whether it should be broadly 23 construed as an all-or-nothing temporal 24 limitation, as the defendant urges, or whether a</p>
6	8
<p>1 to segregate his work force every single day, it's 2 ever changing, to make sure that they comply with 3 BIPA. Some days and some employees or not for 4 others on other days? That's unmanageable. 5 There's nothing in the statute that says that that 6 is required. It doesn't say that this -- nothing 7 in the statute applies to individuals who are 8 working for a local government contract or a state 9 government contract. It says that applies to 10 entities when they are working. 11 And so because of that, this exemption 12 applies to this case. It defeats plaintiff's 13 claims under 2-619. And we ask that the Court 14 dismiss the case entirely on that basis. 15 We do cite to the Enriquez decision, and 16 the Court took up the same time -- or took up the 17 same issue, and it said that what matters is 18 whether the entity was working for the unit of 19 government during the period that the alleged 20 violations occurred. Therefore, we ask you to 21 reject plaintiff's arguments on that note. 22 I can go in to the rest of our motion, 23 but -- 24 THE COURT: Let's do this, I'll let</p>	<p>1 context-dependent inquiry is required to determine 2 the scope and contours of the exemption. 3 Under the exemption as advocated by 4 defendant, it would completely swallow the rule. 5 Any entity with a single government contract in 6 place at the time the biometric scanning occurs, 7 no matter how attenuated to the contract all that 8 company's biometric scanning may be, would enjoy 9 blanket immunity from BIPA. 10 I think we give some top-line 11 hypotheticals in our response brief that the 12 defendant doesn't really address. Supermarkets, 13 gas stations, and school cafeterias, all of these 14 types of entities are specifically called out by 15 name by the literature in -- in passing BIPA. All 16 of these entities have some amount of private 17 entity contracting with government entities. 18 Under the defendant's reading of the law, it would 19 make them all exempt from the protections of BIPA. 20 I thought of another hypothetical that I 21 wanted to discuss. There is a McDonald's on the 22 Great Lakes Navy base, right. The McDonald's on 23 the Great Lakes Navy base is there pursuant to one 24 or several government contracts. If the</p>

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3 (9 to 12)

9	<p>1 McDonald's scans its employees' biometrics for 2 timekeeping on that Navy base pursuant to that 3 contract, those employees are not subject to the 4 protect -- are not protected by BIPA, because the 5 McDonald's operating under that government 6 contract would be exempt by the government 7 contractor exemptions. If the law is extended the 8 way the defendant urges, all the employees of 9 McDonald's in the entire state of Illinois would 10 have no protections under BIPA by virtue of the 11 one McDonald's on a government base with a 12 government contract.</p> <p>13 That is totally inconsistent with the 14 legislature's insertion of the "when working for" 15 language as a modifier of State agency, and unit 16 of government. The defendant's interpretation 17 reads that modifier right out of statute. If 18 that's what the legislature had intended to do, it 19 could have just stopped and wrote: Nothing in 20 this Act shall be construed to apply to a 21 contractor, subcontractor, or agent of a State 22 agency or local unit of government, period. It 23 didn't do that. It added, comma, when working for 24 the government, right. So it's not the case that</p>	11
10	<p>1 if you're a contractor you get blanket immunity. 2 The defendant calls this a temporal 3 limitation and says that the contours of it are 4 well-settled and defined by Enriquez. But 5 Enriquez didn't even address this issue. The 6 holding in Enriquez was very narrow because the 7 facts were so unique and specific. In that case 8 NPI, Inc., which is Navy Pier, Incorporated, 9 existed exclusively for the purpose of operating 10 and managing Navy Pier. It had no other purpose. 11 It did that under a contract with the Metropolitan 12 Pure Expansion Authority, which is the government 13 entity that owns the land of Navy Pier and its 14 buildings, right.</p> <p>15 Enriquez gives no guidance on what the 16 contours of the so-called temporal limitation 17 "when working for" actually are, because Navy Pier 18 was never not working for the government entity. 19 All of its work was pursuant to performing that 20 government contract. So this issue wasn't even 21 raised. The sole question in that case was 22 whether Navy Pier, Incorporated satisfied the 23 definition of a government contractor, even though 24 its legal relationship was one of the government's</p>	12
	<p>1 lessee. And the Court found that it did, saying 2 that it performs governmental services on behalf 3 of MPEA pursuant to a contract, and MPEA retains a 4 level of oversight. It was not the Court -- the 5 Enriquez Court was not called upon to define the 6 scope of any temporal limitation called for by 7 "when working for." It only answered the very 8 narrow question presented in that case. It's a 9 narrow holding that should be limited to its 10 facts, and it remains unpublished.</p> <p>11 As Your Honor noted, there are some sister 12 court citations that, you know, both parties have 13 cited. I'd like to discuss a couple of them if 14 that's okay. The defendant --</p> <p>15 THE COURT: Can I ask you a question? 16 MR. FEUER: Go ahead, Judge, of course. 17 THE COURT: And don't -- it's your 18 position that while your client worked for Homer, 19 that Homer also had contracts with nongovernmental 20 units; is that correct? 21 MR. FEUER: Yeah, that's undisputed by 22 Homer's declaration. 23 THE COURT: Everybody agrees with that? 24 MR. FEUER: Yeah, everybody agrees with</p>	

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4 (13 to 16)

13	<p>1 that that case is more persuasive than the case</p> <p>2 that we point to, which is, sorry, Navarette</p> <p>3 versus Josam Acquisitions.</p> <p>4 THE COURT: And again, Navarette and</p> <p>5 Miranda are both decisions by Courts that are at</p> <p>6 (indiscernible) level, right, they're not</p> <p>7 appellate.</p> <p>8 MR. FEUER: Yes.</p> <p>9 THE COURT: Right?</p> <p>10 MR. FEUER: They're both Cook County</p> <p>11 Chancery Court decisions and came to the opposite</p> <p>12 conclusions.</p> <p>13 THE COURT: Right. But they're not</p> <p>14 persuasive and they're not -- they're not</p> <p>15 precedential, right?</p> <p>16 MR. FEUER: They are not precedential --</p> <p>17 THE COURT: They're just what my friends</p> <p>18 over at Chancery are doing.</p> <p>19 MR. FEUER: Sure, yeah. And if the Court</p> <p>20 wishes to look at them as persuasive authority or</p> <p>21 not, for guidance or not, that's up to the Court</p> <p>22 to consider.</p> <p>23 THE COURT: Yes.</p> <p>24 MR. FEUER: We urge the Court to look at</p>	15
14	<p>1 25(e) and read Section 25 of BIPA as a whole to</p> <p>2 aid its inquiry into the scope and limitations of</p> <p>3 this government contractor exemption. You have to</p> <p>4 read -- we urge the Court to read it as all the</p> <p>5 other exemptions in Section 25, which harmonize</p> <p>6 BIPA with existing frameworks that are already in</p> <p>7 place to regulate certain industries or to prevent</p> <p>8 conflict with other laws, right.</p> <p>9 So for example, 25(a), it prevents BIPA</p> <p>10 from conflicting with codes of civil procedure and</p> <p>11 criminal procedure and rules of evidence, right.</p> <p>12 So biometric data can be freely used in court</p> <p>13 proceedings without violating BIPA.</p> <p>14 25(b) harmonizes BIPA and prevents it from</p> <p>15 conflicting with HIPAA and the X-Ray Retention Act</p> <p>16 as to covered entities under those laws, hospitals</p> <p>17 and doctors.</p> <p>18 25(c) harmonizes BIPA and prevents it from</p> <p>19 conflicting with the Gramm-Leach-Bliley Act as to</p> <p>20 covered financial institutions.</p> <p>21 25(d) prevents BIPA from conflicting with</p> <p>22 the Private Detective and Locksmith Act of 2004,</p> <p>23 Right.</p> <p>24 Those sections, those exemptions, all call</p>	16
	<p>1 out the other law or -- or were code of laws that</p> <p>2 BIPA is trying to interact with and not step on.</p> <p>3 And with -- with 25(e), you know, it's --</p> <p>4 it was written as intended to prevent conflict</p> <p>5 with principles of sovereign and tort immunity</p> <p>6 that are applicable to government contractors when</p> <p>7 working for the government. The insertion of that</p> <p>8 adverbial modifier "when working for" narrows the</p> <p>9 exemption by tying it to the work that's actually</p> <p>10 being performed with or for the government.</p> <p>11 And we think this is consistent with how</p> <p>12 tort immunity provisions have always been</p> <p>13 interpreted. We cite a couple of cases in our</p> <p>14 brief for this one, United States Supreme Court</p> <p>15 case, that government contractors don't get</p> <p>16 blanket tort immunity; they get it for the acts</p> <p>17 they perform in the discharge of their government</p> <p>18 contracts.</p> <p>19 So we think that any other view of this</p> <p>20 exemption would cause exemption to swallow the</p> <p>21 rule and render the modifying phrase "when working</p> <p>22 for" completely superfluous, which is not</p> <p>23 consistent with statutory interpretation.</p> <p>24 THE COURT: Thank you.</p>	



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5 (17 to 20)

17	<p>1 by saying that this exemption would completely</p> <p>2 swallow the rule. That is not the issue. The way</p> <p>3 they're arguing it actually would take it exactly</p> <p>4 the other way; it would completely alleviate the</p> <p>5 exemption and rid government crews of the</p> <p>6 exemption.</p> <p>7 The hypotheticals that they bring up are</p> <p>8 not evidence. There is no evidence at all with</p> <p>9 all these other, you know, McDonald's or anything</p> <p>10 like that, what those government contracts are or</p> <p>11 anything like that. And just because an entity --</p> <p>12 you know, we don't have any of those facts here,</p> <p>13 nor do they apply.</p> <p>14 We are looking here at the facts of this</p> <p>15 case where the plaintiff worked on projects under</p> <p>16 the IDOT and local government contracts during the</p> <p>17 entirety of his position as a climber. There's</p> <p>18 also no evidence to contest that the plaintiff</p> <p>19 didn't work on those government contracts. Our</p> <p>20 declaration says that he worked on those</p> <p>21 government contracts during his employment. And</p> <p>22 plaintiff has not provided any counter declaration</p> <p>23 to dispute that. That's all argument. There's</p> <p>24 nothing even in the pleadings that discusses that.</p>	19
18	<p>1 You know, going back to the cases they've</p> <p>2 cited, I would say that Enriquez actually does</p> <p>3 address what it means to be working for. There's</p> <p>4 a section in Section 23 of the decision that we</p> <p>5 would suggest is very persuasive.</p> <p>6 THE COURT: Wait. You're saying that --</p> <p>7 you're citing the unpublished decision that</p> <p>8 Enriquez --</p> <p>9 MS. KAYS: As persuasive --</p> <p>10 THE COURT: Sure.</p> <p>11 MS. KAYS: Not precedential, not binding,</p> <p>12 but persuasive.</p> <p>13 THE COURT: Sure. I get that.</p> <p>14 MS. KAYS: And they look at what does it</p> <p>15 mean for an entity to be working on a government</p> <p>16 contract. And they say that that phrase means</p> <p>17 that the unit -- or the company, the entity, is</p> <p>18 working for a local government contract in some</p> <p>19 type of services relationship. It doesn't look at</p> <p>20 the temporal, you know, the -- I guess the time</p> <p>21 frame of the government contract. It doesn't look</p> <p>22 at whether the individuals were working on a</p> <p>23 contract. But regardless, it does say that it's</p> <p>24 simply -- "working for" simply means being in a</p>	20

1 services agreement.

2 I would argue, you know, that is relevant

3 because, again, there's -- they're looking at it

4 broadly to say that it just -- it just -- the

5 language depends on if you are engaged in this

6 services agreement.

7 THE COURT: But can I ask you a question

8 about the Enriquez case?

9 MS. KAYS: Sure.

10 THE COURT: I don't recall. Was that a

11 pleadings decision or was that a motion for

12 summary judgment decision?

13 MS. KAYS: That was on a motion to

14 dismiss, Your Honor. I'll confirm that. Yes.

15 THE COURT: Okay.

16 MS. KAYS: And that's because this is --

17 again, this is a requirement in order to find a

18 private entity is -- you know, is covered by BIPA.

19 The other exemptions that the plaintiff

20 has pointed out regarding the health care

21 exemptions, again, those have recently been

22 brought before the Illinois Supreme Court, and

23 every single time they look at the plain language

24 of the statute. We would argue that that is what

1 is relevant here. There is no evidence to show

2 that this defendant was not a government

3 contractor during the period. And, you know,

4 their arguments are not legally sound. But also

5 they just -- as I mentioned earlier, it would be

6 ridiculous for a defendant to have to treat each

7 of his individuals differently depending on the

8 hour of the day.

9 THE COURT: Okay. Give me one second.

10 (Pause in proceedings.)

11 THE COURT: Okay. I just want to clarify

12 something with respect to Enriquez. With

13 Enriquez, the company that she worked for, it had

14 a contract with the Metropolitan Pier and

15 Exposition, right --

16 MR. FEUER: Correct.

17 THE COURT: -- Which is a unit of

18 government. It didn't say anything in the

19 opinion, I just went through it real cursory

20 again, that the contractor that Enriquez worked

21 for, that contractor also had contracts with

22 private entities. It specifically only talked

23 about her boss, you know, contracting for -- or

24 her actually working for Navy Pier, government

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6 (21 to 24)

21	<p>1 contractor, right? There's no -- there's no 2 indication that that entity had worked in the 3 private sector. 4 MR. FEUER: That's correct. Navy Pier, 5 Incorporated is a not-for-profit organization 6 that's sole existence is tied to operating Navy 7 Pier on this contract from MPEA. It has no -- 8 THE COURT: Okay. Okay. That's what I -- 9 yes. 10 And you agree with that, Ms. Kays? Navy 11 Pier, or is it -- NPI is solely contracting with 12 the government. It has -- the opinion does not 13 identify that it also had contracts with private 14 entities. It did not -- the opinion does not talk 15 about NPI working also with private business. You 16 agree with that? 17 MS. KAYS: Yes, I agree with that. 18 THE COURT: Okay. And that is different 19 from your client, who has government contracts and 20 private contracts, right? Homer has private 21 contracts, right? 22 MS. KAYS: That is correct, Your Honor. 23 However -- 24 THE COURT: Okay.</p>	23	<p>1 he's worked on those contracts. And if I may, 2 Your Honor, the statute doesn't say that when a 3 person is working on a government contract, it 4 says an entity when working on a government 5 contract. And -- 6 THE COURT: Got it. 7 MS. KAYS: And we are -- we are the 8 entity; we were a government contractor that 9 entire time. We have said that plaintiff worked 10 on those contracts throughout his employment. And 11 there's nothing in the statute that says that the 12 exemption doesn't apply on an individual basis. 13 THE COURT: Okay. Okay. So your 14 position, Ms. Kays, is that the statutory language 15 is clear, and that statutory language is -- bear 16 with me. 17 MS. KAYS: I have it if you'd like. 18 THE COURT: No, I have it. No, I want 19 it -- I found it. 20 740 ILCS, Section 25(e) says: Nothing in 21 this Act shall be construed to apply to a 22 contractor, subcontractor, or agent of a State 23 agency or local unit of government when working 24 for that State agency or local unit of government.</p>
22	<p>1 MS. KAYS: -- there is no evidence at all 2 that plaintiff worked on those private contracts. 3 What we have said is that they were a -- 4 THE COURT: Well, okay. But then it would 5 be -- I mean, we're in the pleadings stage. Of 6 course there isn't evidence at this point, right? 7 We haven't done discovery. 8 MS. KAYS: But, Your Honor, if I may, 9 we've submitted a declaration under 2-619 saying 10 that since 2018 to the time of this declaration, 11 the plaintiff worked on projects under the IDOT 12 and local government contracts -- 13 THE COURT: Right. And -- 14 MS. KAYS: -- during his employment. 15 THE COURT: And did -- 16 MS. KAYS: There is also -- 17 THE COURT: Did you also indicate -- 18 I'm sorry. I just violated my rule. 19 Sorry, Mary. 20 Is there any -- your declaration, you're 21 saying that the plaintiff did not work on any 22 nongovernmental projects. 23 MS. KAYS: There's nothing in the evidence 24 to say that. What we're saying is that since 2018</p>	24	<p>1 I need to point out that I am persuaded by 2 Mr. Feuer's argument that if the language of this 3 statute wanted to say that the -- nothing in this 4 Act shall be construed to apply to a contractor, 5 subcontractor, or agent of a State agency or local 6 unit of government, it could have stopped there. 7 However, the Court must consider that phrase when 8 working for that State agency or local unit of 9 government. 10 And so in considering that, this Court 11 cannot find right now that there's an affirmative 12 matter that negates this complaint. There's a 13 question of fact as to whether or not this comes 14 into play. And because there's a question of 15 fact, I can't find that there is an affirmative 16 matter that this exemption that negates 17 plaintiff's complaint. 18 So for purposes of this pleading, statute, 19 and the fact that the case that -- the unpublished 20 case that you're relying on for persuasive 21 authority dealt with an entity that didn't have 22 any government -- nongovernment contracts, I can't 23 find that this -- this complaint should be 24 dismissed with prejudice under 619. So for the</p>



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7 (25 to 28)

25	<p>1 reasons I've just stated, the motion as to 619 is</p> <p>2 denied.</p> <p>3 I think we have some things to talk about</p> <p>4 with respect to 615. We have a five -- is it a</p> <p>5 five-count complaint?</p> <p>6 MR. FEUER: It's a three-count complaint,</p> <p>7 Judge, I think.</p> <p>8 THE COURT: I didn't mean to add.</p> <p>9 Three-count complaint.</p> <p>10 And, Ms. Kays, do you want to just briefly</p> <p>11 state your concerns about the matter in which</p> <p>12 the -- each of these counts are pled or the</p> <p>13 complaint is pled?</p> <p>14 MS. KAYS: Yes, absolutely. So starting</p> <p>15 with Section 15(a), it involves the requirement</p> <p>16 that the defendant have a policy to destroy</p> <p>17 biometric information and keep that policy.</p> <p>18 There's -- the Courts have held, with respect to</p> <p>19 that specific section, that that only is a public</p> <p>20 duty, it's not a private right, unless there is --</p> <p>21 unless the plaintiff has been aggrieved. And that</p> <p>22 under Section 15(a) specifically, there's an</p> <p>23 allegation that the defendant failed to destroy</p> <p>24 biometric information.</p>	27
26	<p>1 That does not exist here. Plaintiff is</p> <p>2 trying to conflate disclosure cases with the --</p> <p>3 you know, the 15(a) policy obligations. And the</p> <p>4 Courts have held that the plaintiff cannot state a</p> <p>5 claim under Section 15(a), on an individual basis</p> <p>6 if there is not that allegation.</p> <p>7 THE COURT: So there has been an</p> <p>8 allegation that the plaintiff has been aggrieved</p> <p>9 in some way. And your position is that count 1</p> <p>10 doesn't delineate any way that the plaintiff has</p> <p>11 been aggrieved; is that correct?</p> <p>12 MS. KAYS: That's right.</p> <p>13 THE COURT: Okay.</p> <p>14 Mr. Feuer, what's is your position on</p> <p>15 that? I personally don't see anything</p> <p>16 specifically saying that.</p> <p>17 MR. FEUER: Yeah, 15(a) imposes a panoply</p> <p>18 of duties. There's three distinct duties: The</p> <p>19 duty to develop a data retention policy, a duty to</p> <p>20 publicly disclose it, and the duty to comply with</p> <p>21 it by destroying the biometrics when the company's</p> <p>22 purpose for using them has ceased or within three</p> <p>23 years after employment ends, whichever comes</p> <p>24 first.</p>	28

1 So to the extent that our allegations fall

2 short of that, I would be happy to amend it. You

3 know, to be frank, this is one of our earlier

4 complaints, and I think we're doing them a little

5 different now. So if the Court would permit it, I

6 would be glad to amend the 15(a) count to more

7 clearly allege that defendant failed to have a

8 retention policy in place at the time that it

9 scanned its biometrics and failed to actually

10 destroy its biometrics consistent with its policy

11 with BIPA.

12 THE COURT: And I think you need to get a

13 little more specific than that, sir. I mean, how

14 does it affect your client? Where's the harm?

15 The defendant has a right to know what he's

16 being -- what they're being accused of and they

17 have the right to have the opportunity to respond.

18 I mean, you can put what you just said in, but

19 really, where's the right of action if you're not

20 alleging specifically, to some sense specific, how

21 your client's been harmed.

22 So count 1 is dismissed with leave to

23 amend.

24 Count 2 then, Ms. Kays?

1 MS. KAYS: Your Honor, so count 2 falls

2 under Section 15(d). There are no facts that

3 supports a claim that there was any disclosure.

4 You know, I posit that there is no disclosure.

5 But regardless, we can't -- you know, the Illinois

6 pleading standards do require facts, not just

7 assumptions, not just conclusions, not just

8 parroting of the statute. The plaintiff has not

9 cited, you know, cases -- they cite cases saying

10 that the standard should be different if there's a

11 vendor versus not a vendor. However, again, they

12 don't cite cases that -- that pertain to the

13 section -- excuse me -- 15(d) allegations or

14 violations. And, you know, Courts have agreed

15 that there needs to be some facts to support that

16 there has been a disclosure. So we ask that this

17 count also be dismissed.

18 THE COURT: Go ahead, Mr. Feuer.

19 MR. FEUER: We don't cite cases that say

20 the standard should be different. We say that the

21 standard is different. In cases against an

22 employer, the case law sort of roundly holds that

23 a disseminate -- allegations of a dissemination to

24 a payroll company are sufficient for purposes of

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29	<p>1 stating a claim under 15(d) of BIPA.</p> <p>2 You know, we don't know this specific</p> <p>3 details about the dissemination between Homer and</p> <p>4 its vendors; that's something that we need</p> <p>5 discovery to understand. We do know the name of</p> <p>6 the payroll company, and we could amend the</p> <p>7 complaint to add that and some more facts that we,</p> <p>8 we may -- that Mr. Rojo may have that form the</p> <p>9 basis of why he believes his biometric data was</p> <p>10 transmitted to ADP, you know, consistent with our</p> <p>11 understanding of how these systems generally work.</p> <p>12 So our hands are sort of tied at this stage</p> <p>13 without the benefit of discovery. And the case</p> <p>14 law that we have cited we think is reasonably</p> <p>15 clear that, you know, when you're not suing, like,</p> <p>16 a data processing technology company or having</p> <p>17 nebulous claims of data sharing, it's a</p> <p>18 straightforward allegation that the biometric</p> <p>19 information was captured by the scanner and was</p> <p>20 transmitted in the form of a mathematical</p> <p>21 representation, which is biometric information to</p> <p>22 ADP for the purposes of payroll processing. I</p> <p>23 don't think that we need more than that. But if</p> <p>24 the Court disagrees, we would like an opportunity</p>	31
30	<p>1 to try to flesh this out a little bit more.</p> <p>2 THE COURT: Well, I do think that is --</p> <p>3 it's -- there's -- like paragraph 65, defendant</p> <p>4 knew or was reckless in not knowing that biometric</p> <p>5 timekeeping systems would be subject to the</p> <p>6 provisions of BIPA. You know, what I expect with</p> <p>7 these allegations that you're putting forth is not</p> <p>8 conclusions, not suppositions, but, you know,</p> <p>9 facts, we're a fact-pleading jurisdiction.</p> <p>10 So count 2 is dismissed with leave to</p> <p>11 amend. And you need to fill in the blanks.</p> <p>12 Don't -- the defendant doesn't have to guess, nor</p> <p>13 does the Court have to guess at what you're trying</p> <p>14 to get at. There's a lot that you can -- you can</p> <p>15 add in here with respect to your -- the allegation</p> <p>16 of dissemination to notify the -- or at least put</p> <p>17 the defendant on notice as to what they have to</p> <p>18 respond to.</p> <p>19 MR. FEUER: Understood, Judge. Just</p> <p>20 for --</p> <p>21 THE COURT: Yes, sir.</p> <p>22 MR. FEUER: Sorry, count 15(d) is count 3,</p> <p>23 that's the dissemination, so --</p> <p>24 THE COURT: Count 2 -- 15(a). I</p>	32
	<p>1 apologize, I apologize. Count 3. 15(a), do you</p> <p>2 have an issue with count 2? No, no, I apologize.</p> <p>3 Let me back up.</p> <p>4 Count 2 is 15(b). Count 3 was 15(b).</p> <p>5 That's what you just talked about right, Ms. Kays?</p> <p>6 MS. KAYS: Yes, Your Honor.</p> <p>7 THE COURT: What about count 2?</p> <p>8 MS. KAYS: I don't believe that we</p> <p>9 brought -- if you can give me a moment. I don't</p> <p>10 think we filed a motion to dismiss that count.</p> <p>11 But I mean, to be honest, Your Honor, the</p> <p>12 allegations in the complaint we feel are cookie</p> <p>13 cutter and sparse and don't have facts to support</p> <p>14 them in any of the claims.</p> <p>15 THE COURT: So, Mr. Feuer, you're correct,</p> <p>16 paragraph 65 does go to count 2, and it's on the</p> <p>17 Court's motion then that it is dismissed with</p> <p>18 leave to amend to be made more specific --</p> <p>19 consistent with the Court's position on count 1.</p> <p>20 And count 3, the only thing that I would</p> <p>21 like to say at this point with count 3 is that</p> <p>22 it's the same, it's just too sparse; it's just too</p> <p>23 many conclusions; it's not specific enough. It</p> <p>24 needs to be briefed up. This is a very important</p>	

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33	<p>1 THE COURT: Yes.</p> <p>2 MS. KAYS: -- you brought them up in</p> <p>3 count 2.</p> <p>4 THE COURT: Yeah.</p> <p>5 MS. KAYS: You think that they are in each</p> <p>6 of the counts. And so we ask that that -- you</p> <p>7 know, that the reason for dismissal be on that</p> <p>8 basis as well.</p> <p>9 THE COURT: Yes. Let me just identify</p> <p>10 something with respect to the recklessness.</p> <p>11 So, Mr. Feuer, your response to the</p> <p>12 plaintiff -- so this is what I don't understand:</p> <p>13 Plaintiff asserts that -- I'm sorry.</p> <p>14 Defendant asserts that you have, the</p> <p>15 plaintiff, has failed to plead recklessness or</p> <p>16 intent as required under BIPA. And your position</p> <p>17 is you're not required to plead recklessness or</p> <p>18 intent because they're not essential elements of</p> <p>19 the claim under BIPA. Yet, your complaint pleads</p> <p>20 recklessness. Why? It seems confusing. You say,</p> <p>21 I'm pleading recklessness, and then you're like,</p> <p>22 well, I am not required to.</p> <p>23 MR. FEUER: Yeah, Judge --</p> <p>24 THE COURT: What are you going to do?</p>	35	<p>1 damages. So a plaintiff can prevail on a BIPA</p> <p>2 case without proving any negligence or</p> <p>3 recklessness, in our view. But that would not</p> <p>4 entitle the plaintiff to damages for negligence or</p> <p>5 damages for recklessness, they would have to prove</p> <p>6 some level of culpability being entitled to those</p> <p>7 damages, but not to prove their case, which would</p> <p>8 entitle them to attorney's fees and injunctive</p> <p>9 relief that the biometrics be dealt with according</p> <p>10 to the law.</p> <p>11 THE COURT: So if I can make an analogy.</p> <p>12 In a personal injury case, the pleading of willful</p> <p>13 and wanton behavior, it's not necessarily pled in</p> <p>14 the negligent count, it's a separate count;</p> <p>15 correct? That -- when it gets pled. So that -- I</p> <p>16 mean, I think in personal injury cases you have to</p> <p>17 actually be given leave by the Court to file a</p> <p>18 willful and wanton count. Is that -- I don't</p> <p>19 think anyone disagree with me on that. And I'm</p> <p>20 not saying that that's suggested here.</p> <p>21 MR. FEUER: Yeah.</p> <p>22 THE COURT: But what I'm hearing you say</p> <p>23 is that you're pleading it because it affords you</p> <p>24 the opportunity to go after other forms of relief,</p>
34	<p>1 MR. FEUER: Our position is that it's a --</p> <p>2 it's a measure of damages that the factfinder can</p> <p>3 determine after liability has been established.</p> <p>4 And so pleading a culpability standard is not</p> <p>5 required because it's a strict liability statute.</p> <p>6 But there's some divergence of opinion on those</p> <p>7 points, and so, you know, because we're seeking</p> <p>8 recklessness damages, we -- we called that out in</p> <p>9 our complaint that that is -- that that is a level</p> <p>10 of culpability that we're going to seek to prove</p> <p>11 in order to be entitled to the higher of the two</p> <p>12 statutory damage awards. Courts have held that</p> <p>13 there's -- there really isn't any need to, you</p> <p>14 know, plead specific facts beyond what we've pled</p> <p>15 to at least state negligence. The Courts have</p> <p>16 also stricken recklessness allegations that are</p> <p>17 pled similar to the way we have with leave to</p> <p>18 replead them.</p> <p>19 So, you know, the law isn't super clear on</p> <p>20 this, but I think that it is relatively clear that</p> <p>21 negligence and recklessness are not elements of a</p> <p>22 BIPA claim; they're -- they are standards of</p> <p>23 damages that -- standards of culpability that must</p> <p>24 be met in order to obtain measures of liquidated</p>	36	<p>1 such as payment of attorney's fees.</p> <p>2 MR. FEUER: The statutory damages that are</p> <p>3 available to plaintiff are available based on the</p> <p>4 level of culpability that the plaintiff can</p> <p>5 ultimately prove. So we plead the levels of</p> <p>6 culpability that we intend to prove, either both</p> <p>7 or in the alternative, in order to alert the Court</p> <p>8 and the factfinder and opposing counsel of what</p> <p>9 our claim is about and what we're seeking. I</p> <p>10 think that we would be entitled to win a case</p> <p>11 without respect to culpability, negligence or</p> <p>12 recklessness, and that would entitle us to</p> <p>13 attorney's fees, costs of the case, and injunctive</p> <p>14 relief if applicable. I don't think that requires</p> <p>15 proven culpability.</p> <p>16 But culpability is -- while it's not an</p> <p>17 element of the claim, it's a term reflecting --</p> <p>18 negligence and recklessness, as we say in our</p> <p>19 brief, were terms reflecting degrees of</p> <p>20 culpability that we will ultimately attempt to</p> <p>21 prove at trial. And I think that, you know, the</p> <p>22 cases that we cite support that the allegations --</p> <p>23 specifically with respect to number 65 that you</p> <p>24 pointed out, there have been cases, you know,</p>

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37	<p>1 cases in the Northern District, published</p> <p>2 opinions, that discuss -- alleging that the</p> <p>3 defendant violated a law in 2024 that's been in</p> <p>4 effect since 2008 is a sufficient allegation to</p> <p>5 state the recklessness standard. Whether -- you</p> <p>6 know, obviously, more facts will need to be</p> <p>7 deduced to prove recklessness. But there is BIPA</p> <p>8 case law which holds that that is a sufficient</p> <p>9 allegation to plead it.</p> <p>10 MS. KAYS: May I?</p> <p>11 THE COURT: Yes, you may. Just give me</p> <p>12 one second.</p> <p>13 Okay. Yes, please.</p> <p>14 MS. KAYS: Your Honor, I mean, as this</p> <p>15 Court knows, the pleadings standards in federal</p> <p>16 court are different than in state court. The</p> <p>17 cases they cite are not binding nor applicable.</p> <p>18 And, you know, we've cited a number of cases by</p> <p>19 your fellow colleagues that do find that if they</p> <p>20 want to seek the heightened standard for damages,</p> <p>21 that they need to file -- or they need to submit</p> <p>22 facts to support why this was reckless.</p> <p>23 Essentially what they're saying is that,</p> <p>24 well, we should have known. But that's not</p>	39	<p>1 it. I've learned a lot. And we just need a -- we</p> <p>2 start at 21 to amend, 28 to respond, to either</p> <p>3 answer or otherwise plead. And what's it,</p> <p>4 about -- that's almost 50 days.</p> <p>5 So how about, Angie, can we come back for</p> <p>6 status about 60 days out?</p> <p>7 COURT CLERK: Yes. We can do July 29 at</p> <p>8 9:30.</p> <p>9 THE COURT: Okay. Continue for status,</p> <p>10 July 29th at 9:30.</p> <p>11 MS. KAYS: Your Honor, if I may, I'm gone</p> <p>12 that week.</p> <p>13 THE COURT: That's fine.</p> <p>14 MS. KAYS: Can we instead look at the</p> <p>15 week, like, after the 6th?</p> <p>16 THE COURT: Of May -- May.</p> <p>17 MS. KAYS: August, yes.</p> <p>18 THE COURT: That's fine. So our</p> <p>19 coordinator is out sick today and so we have --</p> <p>20 Angie, did she give you any days in August</p> <p>21 or should we throw a dart and see what works?</p> <p>22 COURT CLERK: I suppose I'll throw a dart</p> <p>23 and then --</p> <p>24 THE COURT: Throw a dart. Let's see.</p>
38	<p>1 willful or reckless conduct; that goes back to</p> <p>2 negligent conduct. For them to seek heightened</p> <p>3 damages in this case at the level that they are</p> <p>4 seeking, we posit that this Court should dismiss</p> <p>5 their claim without any facts to support it. And</p> <p>6 some Courts have dismissed it with prejudice.</p> <p>7 THE COURT: So I think I'm just going to</p> <p>8 go back to the fact that Illinois is a</p> <p>9 fact-pleading jurisdiction, and that the whole</p> <p>10 idea is for everybody to know, going into the</p> <p>11 litigation, what it's about. And so because</p> <p>12 there's really no guidance from the Appellate</p> <p>13 Court and the Courts seem to be all over the place</p> <p>14 just where to land on this, if you're going to say</p> <p>15 their mental state was reckless, give some facts</p> <p>16 to lead to that conclusion. Don't state the</p> <p>17 conclusion and just leave it there. Provide us,</p> <p>18 provide the Court, provide the defendant, with</p> <p>19 some information that will -- that substantially</p> <p>20 can point to that.</p> <p>21 MR. FEUER: Understood, Your Honor. We'll</p> <p>22 endeavor to do that, absolutely.</p> <p>23 THE COURT: Okay. That's easy. Thanks.</p> <p>24 This has been a really good hearing. I appreciate</p>	40	<p>1 COURT CLERK: What about maybe August 1st.</p> <p>2 THE COURT: Are you still going to be</p> <p>3 gone?</p> <p>4 MS. KAYS: Yes. I think that is the same</p> <p>5 week. So the week of August 6th, please.</p> <p>6 THE COURT: Yeah, let -- let me give you a</p> <p>7 date.</p> <p>8 COURT CLERK: I know the 5th through the</p> <p>9 9th won't work for the Court.</p> <p>10 THE COURT: Correct. That's where I was</p> <p>11 going. How about the 12th, would that work?</p> <p>12 MR. FEUER: There's nothing on my</p> <p>13 calendar, which must be a mistake, so -- must be a</p> <p>14 glitch. But I'm sure that -- we'll make that work</p> <p>15 on the plaintiff's end.</p> <p>16 THE COURT: I mean, it's just a status.</p> <p>17 Somebody can jump in.</p> <p>18 MR. FEUER: Exactly.</p> <p>19 MS. KAYS: Yeah. Thank you, Your Honor.</p> <p>20 THE COURT: You're welcome. And, yeah,</p> <p>21 we'll just go from there.</p> <p>22 (Proceedings conclude at 1:34 p.m.)</p> <p>23</p> <p>24</p>

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## 1 CERTIFICATE

2  
3 I, MARY VAZQUEZ-JAIME, a Certified Court  
4 Reporter of the State of New Jersey, do hereby  
5 CERTIFY that the foregoing is a true and accurate  
6 transcript of the Motion Hearing as taken  
7 stenographically by and before me at the time,  
8 place and on the date hereinbefore set forth.

9 I DO FURTHER CERTIFY that I am neither a  
10 relative nor employee nor attorney nor counsel of  
11 any of the parties to this action, and that I am  
12 neither a relative nor employee of such attorney  
13 or counsel, and that I am not financially  
14 interested in the action.

15  
16 *Mary Vazquez - Jaime*

17  
18 MARY VAZQUEZ-JAIME, CCR  
My commission expires June 30, 2024  
19 License No. XI00382  
20 Dated: June 8, 2024  
21  
22  
23  
24

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